No. 7. *July Term, 1878.*

13

IN THE

SUPREME COURT OF PENNSYLVANIA,

EASTERN DISTRICT.

APPEAL OF

ROBERT MANNERS, ET AL.

APPELLANTS' PAPER BOOK.

FRANCIS E. BREWSTER,
F. CARROLL BREWSTER,
WILLIAM A. PORTER,
Pro Appellants.

Chandler, Pr., 306 & 308 *Chestnut St., Phila.*

IN THE

Supreme Court of Pennsylvania,

SITTING IN THE

EASTERN DISTRICT.

OF JULY TERM, 1878. No. 7.

APPEAL OF ROBERT MANNERS, ET AL., FROM THE FINAL DECREE OF THE COURT OF COMMON PLEAS No. 1, FOR THE COUNTY OF PHILADELPHIA, *in re*,

MANNERS
vs.
WILLIAMS.

DEC. TERM, 1877.
No. 1319.

APPELLANT'S PAPER BOOK.

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I.—Names of Parties and Nature of the Proceedings.

Robert Manners filed his Bill-in-Equity in the Court of Common Pleas No. 1, Philadelphia County, against Henry J. Williams and "The Philadelphia Library Company," contesting the validity of certain alleged trusts and alleged devises in papers, called the Will and Codicils of Dr. James Rush, deceased. On demurrer the Court dismissed the bill and the plaintiff appealed.

The following is a copy of the

Docket Entries in the Court below.

F. E. Brewster, F. Carroll Brewster, W. A. Porter.	ROBERT MANNERS	
1319.	*vs.*	Bill-in-Equity filed February 15, 1878.
J. G. Johnson and Geo. Junkin, 2, 20, '78.	HENRY J. WILLIAMS AND THE LIBRARY COMPANY OF PHILADELPHIA, A BODY POLITIC AND CORPORATE IN THE LAW.	Service accepted for HENRY J. WILLIAMS.
Rawle and McMurtrie, for the Library Company. 3, 4, '78.		

1878. March 5.—Rule on defendants to demur, plead or answer, filed.

" " " Separate demurrer of Library Company filed.

" " 8.—Separate demurrer of Henry J. Williams filed.

" " 21.—Petition of Elizabeth Murray Rush filed, for leave to become a party plaintiff.

1878. *Eo die.*—The prayer of the petition is granted, and Elizabeth Murray Rush is made a party plaintiff.

" March 28.—By leave of the Court the plaintiff amends the Bill.

" *Eo die.*—Amendment to bill filed.

" April 5.—Additional amendment to bill filed.

" " 6.—Demurrers sustained, and bill dismissed with costs.

" " 10.—Appeal of plaintiffs to Supreme Court, from decree, entered April 6, 1878.

" " 11.—*Certiorari* from the Supreme Court (No. 7, July T., 1878,) brought into office.

II.—Abstract of the Bill.

The bill was filed by :—

" Robert Manners, of London, England, on behalf of him-" self and all others, heirs-at-law of James Rush, deceased, " who, contributing to the expenses of this suit, may be-" come parties." Subsequently, as noted on the Docket Entries, Miss Elizabeth Murray Rush presented her petition, setting forth, *inter alia*, that she was a daughter of James Murray Rush, deceased, who was a nephew of Dr. James Rush, and that she was therefore a grand-niece of Dr. Rush. She was thereupon made a party plaintiff. The defendants named in the bill were :—Henry J. Williams and "The Library Company of Philadelphia."

The bill as amended charged :—

I.—That Dr. James Rush died in the City of Philadelphia, May, 1869, without issue, and not leaving widow, father or mother surviving.

II.—That he was at the time of his death seized and possessed of a large amount of real and personal property.

III.—That Mary Rush, a sister of decedent, inter-married with Thomas Manners, had issue Robert Manners, and died; so that the plaintiff, Major Manners, was a nephew and heir-at-law of decedent.

IV.—That May 31, 1869, without notice to, or knowledge of, plaintiff, certain writings were admitted to probate by the Register of Wills of Philadelphia County as the last Will and Codicils thereto of decedent, and that Letters Testamentary thereon were granted to Henry J. Williams, esq.

V.—That in the attempted disposition of the residue of the estate, the said writings are so uncertain as to be incapable of any clear meaning, are full of contradictory and repugnant clauses, and are impossible of execution; and if possible of being carried out, the execution thereof would be contrary to sound morals and to religion, and would be opposed to the policy of the law.

VI.—That "The Library Company of Philadelphia" have not finally accepted the devise in the alleged Will and Codicils and have declined to accept the same upon the trusts and conditions mentioned.

VII.—That the decedent in the first Codicil to his alleged Will provided that if the Library Company omitted or declined to accept the residue on the conditions mentioned, the executor should found "The Ridgway Library" under the rules, etc., in the alleged Will and Codicils expressed.

VIII.—That it is impossible to carry out the bequest for the "Ridgway Library," because the so-called additional Codicil leaves no funds whatever for the foundation of a library, the whole remainder being consumed in the pur-

chase of the lot, erection of the building and the ordinary expenses of such an institution, leaving nothing for the purchase of books.

For this reason the lot, building and the residue belong to the heirs-at-law, and the said Henry J. Williams is seised to their use.

IX.—That the scheme for the foundation of the Ridgway Library is impracticable, and that it is impossible to execute the same because the alleged Will and Codicils contain provisions (quoted at length in the bill) which cannot be performed after the death of the said Henry J. Williams.

X.—That to carry out and execute the aforesaid attempted devise would be contrary to every principle of good morals and of religion, and would be opposed to the policy of the law. One of the rules being in these words:—"I do not "wish that any work should be excluded from the Library "on account of its difference from the ordinary or conven- "tional opinions on the subjects of science, government, the- "ology, morals or medicine, provided it contains neither "ribaldry nor indecency." As no work is to be excluded on these grounds from said Library, works must be admitted to its shelves which inculcate rebellion, treason, atheism, deism, materialism, or which uphold polygamy and socialism, and which contain the numerous arguments now in existence, or which may hereafter be framed, against religion, and against sound morals and the good order and well-being of society.

The bill then charges that a library thus conducted, with the admission of such works commanded and required, would speedily become a fountain for the corruption of pure religion, sound morals and good order; and for this reason the said residue has become, and is, the property of the plaintiff and other heirs-at-law.

And the plaintiff charges that the works directed by the

said Dr. James Rush to be published "every ten years, and earlier and oftener, if called for," in the paper writing dated April 18, 1867, contain infidel and atheistical sentiments, teachings and arguments, and that said works deny the truths of the Christian religion, and of revelation, and the existence of a God; and the plaintiff charges that the effect of carrying out and executing said trust would be the propagation of infidel and atheistical doctrines, and would be contrary to good morals and to law.

And your orator charges that, for this reason, the residue of said estate has become, and is, the property of your orator and the other heirs-at-law of the said James Rush, deceased, and that the said Henry J. Williams is holder thereof, to their use.

XI.—That the alleged Codicil of April 18, 1867, is a revocation of the preceding papers, and no provision being made therein for failure of the scheme, or for the non-acceptance by the Library Company, the estate is vested in the plaintiff and the other heirs-at-law.

XII.—That within one calendar month prior to his decease Dr. Rush purchased a lot on the Southeast corner of Broad and Christian streets, Philadelphia, which was purchased by him and subsequently conveyed for a charitable use, as set forth in the trusts contained in said alleged Will and Codicils. The contract being in the possession of defendant Henry J. Williams, esq., its date cannot be given, and the plaintiff needs discovery. The plaintiff avers said transaction is void, the purchase for the use of said charity having been made within one calendar month of the decease of decedent, contrary to Act of April 26, 1855, and that the title to the lot is in plaintiff.

XIII.—That no disposition is made of the residue not required for annuities after the erection of the building, etc.,

nor of the increase of the estate after the death of Dr. Rush, "said increase and surplus now amounting to a sum exceed-"ing one hundred thousand dollars, as to all of which your "orator charges that the said Dr. James Rush died intestate."

XIV, XV, XVI, XVII, XVIII.—That Mr. Williams holds the title papers; discovery is needed; that Mr. Williams is collecting the rents, etc., etc.

Prayers.

That the title to the residue may be declared to be in plaintiff; that the attempted dispositions be declared impracticable, and if possible of execution contrary to sound morals; that the purchase of the Broad street lot be declared void under Act of April 26, 1855; that Mr. Williams be declared trustee of plaintiff—with prayers for account, discovery, injunction, conveyance, etc.

Amendment of the Bill.

And now March 28, 1878, by leave of the Court, the plaintiff amends the bill by adding to paragraph XIII, (*page 8*,) the following words:—

"Said increase and surplus now amounting to a sum ex-"ceeding one hundred thousand dollars; as to all of which "your orator charges that the said Dr. James Rush died "intestate."

Further Amendment of the Bill.

And now, April 5, 1878, the plaintiff files this additional amendment to his bill, by adding to Paragraph X, (*page 6*,) the following words:—

And the plaintiff charges that the works directed by the said Dr. James Rush to be published "every ten years, and earlier and oftener, if called for," in the paper writing, dated April 18, 1867, contain infidel and atheistical sentiments, teachings and arguments, and that said works deny the truths of the Christian religion, and of revelation, and the existence of a God; and the plaintiff charges that the effect of carrying out and executing said trust would be the propagation of infidel and atheistical doctrines, and would be contrary to good morals and to law.

And your orator charges that, for this reason, the residue of said estate has become, and is, the property of your orator and the other heirs-at-law of the said James Rush, deceased, and that the said Henry J. Williams is holder thereof, to their use.

The defendants having demurred, the Court dismissed the bill, and this appeal was taken by the plaintiff.

III.—History of the Case.

Dr. James Rush was a resident of Philadelphia. He was the author of several works. One of these had the following title :—

BRIEF OUTLINE OF AN ANALYSIS

OF

THE HUMAN INTELLECT.

INTENDED TO RECTIFY

THE SCHOLASTIC AND VULGAR PERVERSIONS OF THE NATURAL PURPOSE AND METHOD OF THINKING, BY REJECTING ALTOGETHER THE THEORETIC CONFUSION, THE UNMEANING ARRANGEMENT AND INDEFINITE NOMENCLATURE

OF THE

METAPHYSICIAN.

It contained in its Table of Contents the following announcement of subjects :—

"NOTE.—'On the possibility of developing by the micro-
"'scope or by other means *the mental working plan* and visi-
"'ble action of the senses and the brain.'"
"Memorial light to darkness."
"Memorial white to black."
"Conclusive sapidity."
"The mutative vividness of the Vagabond."
"The mutative vividness of the Hero."
"Of the estimated and prospective qualities of a Prince."
"The supposed future mind of a Prince."
"Of the popular and conforming mind of the Physician."
"Of the narrow and protracting mind of the Lawyer."
"Of the Lawyer-like mind of the Judge."
"Of the versatile and disjointed mind of the People."

It would be improper to multiply extracts. These quotations from the title pages will serve at least to show "the versatile and disjointed mind" of the author. In the opinion of the plaintiffs these volumes were designed to teach infidelity, and in the light of that conviction their duty seemed to be very plain. A single extract from the chapter entitled, "The common mode of drawing character," will be sufficient to justify this conclusion. "We may here find," Dr. Rush writes, "a motive for reversing the account in the Jewish "biography of Adam, 'that God made man in his own divine "image;' to the *more probable fact that Moses, or somebody "else, may, in his own metaphysical creation, have made a God "to himself, not only in the image of his own outward form,* "but in the muddled and degraded resemblance to his per-"verted constituents and qualities."

The bill charged that these books "contain infidel and "atheistical sentiments and arguments, and that said works

" deny the truths of the Christian religion, and of revelation " and the existence of a God."

Impressed, doubtless, with a strong desire for the dissemination of these writings, somewhat proud, as it would seem, of these productions, Dr. Rush, on the sixteenth of May, 1866, by a paper, called a Codicil to his Will, directed that no work should be excluded from the Library he endowed " on account of its difference from the ordinary or " conventional opinions on the subject of science, govern- " ment, *theology*, *morals* or medicine, provided it contained " neither ribaldry nor indecency."

And on the eighteeeth of April, 1867, he provided that every decade in the next half century should be supplied with a flood of his teachings. The direction was in the following words :—

" I have given the copyrights of all my works to the Li- " brary Company, and I *will* and *direct* that they shall for " the next half century publish every ten years (and earlier " and oftener if called for) an edition of five hundred copies " of any or of all of them, so that they shall always have on " hand a number sufficient to supply any demand which may " be made for any or either of them at a price not exceed- " ing the cost of publication. I leave additions and correc- " tions in the printer's copies preparatory to a subsequent " edition which I *imperatively require to be published exactly as* " *they are left.* The original parts of them have been written " without assistance, and I wish to be alone responsible for " all the faults of thought, division, definition and style, and " of my corrected orthography as I consider it."

Dr. Rush appears to have considered the question of the location of his Library.

In the original paper he declares that the lot shall be " not " less than one hundred and fifty feet square, situate between " Fourth and Fifteenth and Spruce and Race streets."

"Some weeks before Dr. Rush's death he was very anxious "to have the location of the intended building finally fixed "and settled. He desired Henry J. Williams, esq., to ascer- "tain the size and cost of all the vacant lots on Broad street, "on which street he desired it to be placed."

Statements were procured by Mr. Williams.

"Another gentleman brought Dr. Rush a plan of the lot "on Christian street, and he was so much pleased with it, "that he desired Mr. Williams to buy it at once. Mr. Wil- "liams did so, and when the contract was signed, Dr. Rush "expressed great pleasure that it was concluded, as it relieved "his mind from all anxiety. Some days after Dr. Rush re- "curred again to this subject, as it had probably occurred to "him that he had given Mr. Williams an absolute discretion "as to the situation of the Library by the terms of his Will, "and that Mr. Williams might be induced to overrule his de- "cision after he was gone. He called Mr. Williams to his "bed-side, and asked Mr. Williams to give him a promise "that Mr. Williams would build the Library on that lot, and "nowhere else. Mr. Williams gave him this promise as fully "and solemnly as language could express it."

This part of the appellant's history of the case is taken from the letter of the defendant, Henry J. Williams, esq., to Dr. Willing, printed in the report of Williams' Appeal, 23 P. F. Smith, 258, changing only the pronouns to make the text intelligible.

This transaction occurred "within a month of Dr. Rush's death." (See *William's Appeal*, 23 P. F. Smith, 257.)

Dr. Rush did not fix all this by a Codicil, for he knew of the Act of April 26, 1855, declaring gifts to charities, within a month of the donor's decease, void. He had, in the alleged Codicil of May 16, 1866, denounced this statute as an "ill-conceived, inconvenient and mischievous law, resulting from a narrow sectarian spirit," and had (although wishing to

change the original paper) declared that "to avoid the possibility" of his death within the month he "must let it stand as it is."

The bill in this case therefore truly charged, as part of the history of this transaction :—

"That within one calendar month prior to his decease the "said Dr. James Rush purchased a lot of ground situate on "the Southeast corner of Broad and Christian streets, which "said lot was purchased by him, and was subsequently con-"veyed for a charitable use," etc.

Decision of the Court of Common Pleas.

No opinion was read or filed.

The decree entered was in these words :—

April 6, 1878. — Demurrer sustained and bill dismissed with costs.

Assignments of Error.

The learned Court of Common Pleas erred :—

1.—In dismissing the bill of the plaintiffs.

2.—In not overruling the demurrers of the defendants.

3.—In not deciding that on the facts averred in the bill and admitted to be true by the demurrers, the prayers of the bill ought to be granted.

4.—In not deciding that the attempted disposition of the residue of his estate, by the alleged testator, is impossible of execution and void in law.

5.—In not deciding that the said residue is the property of the plaintiffs and others as heirs-at-law of the said testator.

6.—In not deciding that the increase and surplus of the said estate, referred to in the thirteenth paragraph of the bill, and in the amendment thereto, filed on the twenty-eighth of March, 1878, are vested in the plaintiffs and others as heirs-at-law of the decedent.

7.—In not deciding that the personal duties devolved by the testator on his executors in the management of the Library referred to in the said alleged Will and Codicils, are such as cannot be carried out by means of the trust which the testator has sought to establish.

8.—In not deciding that a trust cannot be maintained in Pennsylvania for the establishment of a Library containing such books as this testator has provided to be placed therein by the fifth paragraph of the paper of sixteenth May, 1866, annexed to the said bill, inasmuch as the same would tend to the corruption of religion, morals and good order, and to the promotion of atheism and infidelity.

9.—In not deciding that as the bill and the amendment filed thereto on the 5th of April, 1878, distinctly averred that the works of the alleged testator directed by him to be published every ten years, and earlier and oftener if called for, contain infidel and atheistical sentiments, teachings and arguments, and that said works deny the truths of the Christian religion, and of revelation and the existence of a God, and as the demurrers admitted to be true the matters of fact thus alleged, a trust cannot be maintained which renders necessary as its chief purpose, the printing, publication and dissemination of such books.

10.—In not deciding that the disposition of the residue of his property which the testator attempted to make is void, inasmuch as the same was made within one calendar month before his decease—a fact clearly averred in the bill, and as clearly admitted by the demurrer.

Argument of Appellants.

It is to be borne in mind that the case below was decided upon a demurrer to the bill. The defendants cannot here be allowed to deny the plaintiff's allegations of fact. If they can do so fairly, they should do so legally. The only method recognized by the law in this behalf is a plea or answer. To stand upon a demurrer and yet deny the averments of our bill is to experiment with the law. The plaintiffs do not mean by this line of remark to contend that matters of legal construction stated in the bill are conceded, but they do insist that a demurrer admits every statement of fact and every deduction of law or of fact properly to be drawn from the admission. If from the tangled mass called a Will and Codicils brought up on this record anything intelligible can be deduced, the following propositions will be found to be undeniable.

I.

The paper termed "Additional Codicil," dated April 18, 1867, undertakes to dispose of the entire estate after paying certain annuities; it recites a former devise of the *greater part*, and then adds:—"*Now* I direct my said executor to expend the *whole* remainder," etc.

So far as the residue is concerned, and we are here contending only for the residue, this Codicil devising the *whole* remainder must, of necessity, revoke antecedent directions. It stands then alone. It devises this whole remainder to a company. In the language of the bill the legatee has "*declined to accept*" the bequest. The demurrer admits this averment. The *additional Codicil* contains no limitation over providing for this contingency. Here, then, is a case in which the donee refuses the gift. There is no provision for this; the gift refused is the residue, and hence it must go to the heir-at-law. This is so clear that further argument would be as useless as an attempt to verify the multiplication table.

II.

The bill avers (Art. XIII) the existence of an increase and surplus as to which Dr. Rush died intestate. The demurrer admits this and all other allegations of fact. How, then, can the bill be summarily dismissed?

III.

The bill charges (Art. V) that the bequests are "*impossible of execution.*" According to the last Codicil, "*the whole remainder*" is to be expended "in the purchase of a "lot and the erection of the Library building, construction of "book-cases, etc., leaving the said Company only an income "sufficient to defray the ordinary and strictly appropriate "expenses of such an institution."

Here, then, is to be erected a magnificent shell, without one dollar to purchase books.

If it is possible to create a library by erecting a building with empty cases, then the scheme here shadowed is practicable. Otherwise it is as unintelligible as the language in which an attempt is made to define the object. Surely there was no occasion to enjoin that "consequential spendthrifts" should be excluded where there was no fund for prodigality to abuse; and there seems to be a touch of irony in the admonition against "wasteful extravagance;" "competing increase;" "ostentatious libraries;" etc.

IV.

A careful reading of these papers cannot fail to develop a difficulty which is regarded by the plaintiffs as insurmountable. No one save Mr. Williams is authorized to execute this scheme, such as it is, and no provision is made for its execution after his death. Hence, the bill charged:— "That said alleged Will and Codicils contain numerous pro- "visions, such as the following, to wit, that "*respectable per-* "*sons depositing an amount and paying an annual sum, to be*

"*fixed by the Board of Managers, are to have the full and* "*free use of the Library;*" and further it is provided that "'*schemers*' and '*consequential spendthrifts*' are to be *ex-* "'*cluded from the direction;*' and further it is provided that "'*all of the works* of the said James Rush, shall, '*for the* "'*next half century*,' be published at intervals of *every ten* "'*years, and earlier and oftener, if called for*, in editions *of* "'*five hundred copies*,' and it is in the said alleged Will and "Codicils *imperatively required* that the said editions *be pub-* "*lished exactly as they are left.*" And the said alleged Will "and Codicils contain divers other minute, particular, and "strict provisions respecting the practical management of the "said Library, requiring for their due execution and perform- "ance the personal care, skill, taste, judgment and discretion "of the said Henry J. Williams. And your orator charges "that these and other provisions of said alleged Will and "Codicils cannot be performed or enforced after the death "of the said Henry J. Williams, by any administrator *de bonis* "*non* of the said James Rush, deceased; nor can the discre- "tion thus personally vested in the said Henry J. Williams "be performed by any other person."

It is too clear for argument that the duties devolved by the testator on Mr. Williams, in the clauses of the Will here referred to, were required to be performed by him because of his personal fitness for their discharge. They are duties peculiarly requiring the personal care and discretion of just such a man—eminent in his profession and remarkable for the exercise of calm and deliberate judgment. This gentleman thus fitted for the work, and known by the testator throughout a long lifetime to be so fitted, is to determine the many delicate and difficult questions thus submitted for his judgment. He is to decide whether the persons depositing an amount and paying an annual sum, are respectable persons. He is to determine who are the schemers and spendthrifts

that are to be excluded from the direction of the Library, and then to take care, as a part of his personal duty, that they are so excluded. He is to determine whether the publication of the works of the testator is called for oftener than ten years, and he is to supply himself with the means of making such a decision. So of other provisions in the Will, of which the foregoing may serve as illustrations. These are personal duties which, on the death of the executor, cannot be exercised by an administrator *de bonis non.* The law will not permit it. *Redfield on Wills,* Part II., Chapter III., Section IV., § 10. This was the very point of the decision in *Ross* vs. *Barclay,* 6 Harris, 179, where Gibson showed, with his usual clearness, that our law does not permit such an administrator "to execute a trust for a collateral purpose; "for instance, to manage the property and invest the proceeds "for accumulation; or to maintain the widow and children; "or to turn the land into money for the convenience of parti-"tion; or *to exercise any discretionary power confided to his* "*predecessor in the administration, for his personal fitness and* "*fidelity.*" Judge Sharswood put the decision in *Waters* vs. *Margerum,* 10 P. F. Smith 39, on the same ground. See also *Conkling* vs. *Edgerton,* 21 Wendell 429. The whole scheme of the testator has therefore failed, and there can be no better proceeding than the present, in which to pronounce it impractible and void.

V.

The plaintiffs contend that these papers, called the Will and Codicils of Dr. Rush, contain a foundation for atheism and infidelity; that the law, while tolerating the freest discussion, will never lend its hand for the protection and support of immorality; that in a land where religion and sound morals are recognized as the foundation stones of government, no trust can exist for the protection of that which destroys the State. Especially must this be the law of Pennsylvania.

"I do not wish" (says Dr. Rush) "that any work should "be excluded from the Library on account of its difference "from the ordinary or conventional opinions on the subject "of science, *government*, *theology*, *morals*, or medicine; pro- "vided it contains neither ribaldry nor indecency."

When he says:—"I do not wish that any work should be excluded from the library on account of its difference," etc., he says, in effect, that every work shall be included, notwithstanding the fact that its teachings may differ from the ordinary or generally received opinions on the subjects referred to. The ordinary and generally received opinion is that there is a God, and that pure morals are necessary to the well being of society. No matter how far any book may go in advancing doctrines opposed to these, it is nevertheless to form a part of the Library; provided only that it do not descend, in its treatment of the subject, to ribaldry or indecency. Avoiding these, it may deny the very existence of a Supreme Being and advocate immorality. No discretion is left to the executor under the Will. The direction which it contains is a command. In the construction of a statute we sometimes speak of a provision as merely directory and not involving in its violation any penalty. In the construction of a Will, such phraseology is unknown. When a testator directs, his direction is absolutely binding. When he says, "I wish," this is equivalent to a positive direction. "I wish" or "I will" are the words most commonly used to express testamentary intention. When a testator says, I wish my executors not to exercise such and such a power until the expiration of a certain time after my decease, the power cannot be exercised until the expiration of the time, and if it were exercised, no man of sense would take title under it. When a testator says I wish A. to have two-thirds of my estate and B. to have one-third, it is impossible for his executors to divide it equally. I wish or I will, are in no proper sense precatory words. They are

words of authority and command. It is true that words of recommendation, confidence or expectation are not sufficient to convert an absolute bequest into a trust. Where a testator made a bequest in fee to his wife and added "having full "confidence that she will leave the surplus to be divided "at her decease justly amongst my children," these words were held not to deprive the wife of her absolute right to the bequest. *Pennock's Estate*, 8 Harris, 268. Of course, this was a mere expression of the testator's confidence in the future conduct of his wife and in her future dealing with the estate, not a direction to her as to the manner in which she should dispose of it. In the *Second Reformed Presbyterian Church* vs. *Disbrow*, 2 P. F. Smith, 219, after a devise to his wife for life, the testator added:—

"But it is my wish and desire that my said wife will leave "at her death the property, or any part that may be then "remaining in her hands, for the benefit of," etc.

The Court held that a fee simple was here implied, not because the word "wish" was a precatory word, but, in the language of WOODWARD, C. J., because the words "any part re- "maining (equivalent to the word residue) imply the right of "consumption—imply that part of the interest devised might "be so used and converted as not to be in existence at her "death, which is inconsistent with the notion that merely a life "estate was devised," etc. The word wish was held therefore not to be mandatory, only because of the inconsistency apparent in two parts of the Will. In *Paisley's Estate*, 20 P. F. Smith, 153, the testator gave to his wife the rents and profits of his property during her life for her support, and the support and education of his children, under the direction of his executors. Say the Court:—

"We must give the words of the Will a reasonable construc- "tion. He certainly never could have intended that in the "support of herself and the support and education of his

"children she should be under the direction of his executors. "They were not to have rule in the household—to direct how "or where she should live; how the children should be fed "and clothed; to what schools they should be sent."

Here, again, there was an apparent inconsistency in the Will, and the Court held that the estate was vested in the wife, but only because of the impossibility of giving it both to the wife and to the children. This is quite sufficient to show that Paisley's Estate, so much relied on in the Court below, has no application to the present case. Nor is there any other case in Pennsylvania or elsewhere which gives countenance to the idea that "I will" or "I wish" are mere precatory words. They are words expressive of the wishes and intentions of the testator, and they must of necessity be words of authority, unless we undertake to make a new Will for him.

The paper of April 18, 1867, contains these most positive words:—"I will and direct that they (the Library Co.,) "*shall*, for the next half century, *publish* every ten years (and "earlier and oftener if called for) an edition of 500 copies of "any or all of them (his works) so that they *shall always* "have on hand a number sufficient to supply any demand "which may be made for any or either of them at a price not "exceeding the cost of publication. I leave additions and "corrections in the printers' copies, preparatory to a subse- "quent edition which I *imperatively require to be published* "exactly as they are left."

The Court are not left in the dark as to the character and contents of the works which the Company are directed to publish. The bill avers thus:—

"And the plaintiff charges that the works directed by the "said Dr. James Rush to be published 'every ten years, and "earlier and of tener, if called for' inthe paper writing dated "April 18, 1867, contain infidel and atheistical sentiments, "teachings and arguments, and that said works deny the

"'truths of the Christian religion, and of revelation, and the "existence of a God;' and the plaintiff charges that the effect "of carrying out and executing said trust would be the "propagation of infidel and atheistical doctrines, and would "be contrary to good morals and to law.

"And your orator charges that for this reason the residue "of said estate has become, and is, the property of your "orator and the other heirs-at-law of the said James Rush, "deceased, and that the said Henry J. Williams is holder "thereof to their use."

These averments (that the works ordered to be published are infidel and atheistical; "that they deny the truths of the "Christian religion and of revelation and the existence of "God") are allegations of matters of fact.

So, too, is the charge that the effect of "carrying out and "executing said trust would be the propagation of infidel and "atheistical doctrines, and would be contrary to good morals "and to law."

The amendment of the 5th of April, 1878, (*see supra page 8,*) expressly averred that these works "contain infidel and athe-"istical sentiments, teachings and arguments, and that said "works deny the truths of the Christian religion and of revela-"tion and the existence of a God;" and the case comes before this Court, as it did before the Common Pleas, with a plain admission by the defendants, in their demurrer, of the character of the works of the testator which he directed, by as powerful words as any man ever used in a Will, to be published certainly every ten years and oftener if called for.

The effect of thus scattering these works broadcast for fifty years is a question of fact. The bill avers that the thing to be published is infidelity, atheism, denial of the truths of Christianity and of revelation, and of the existence of a God. The effect of this, it is averred, will be the propagation of infidelity and of atheism, contrary to good morals and to law.

Both averments of fact are admitted by the demurrer. The only question of law involved upon these facts is the simple proposition :—

Can a trust be maintained in Pennsylvania for the propagation of atheism ?

It is no answer to say that this is a free country, and that our Constitutions allow all men to worship God according to the dictates of their own consciences. A congress of atheists may meet and may preach infidelity every day without fear of any disturbance from the law. To state these facts or to argue upon them, is to evade the true question. The point here presented involves no liberty of conscience, trenches on no right to worship or to abstain from worship. It rises far beyond all these considerations and presents the question :—

Will the law tolerate a trust for the foundation of infidelity ?

It will hardly be argued that a testator can endow a gambling house or a brothel. Yet neither of these could do the harm that would be accomplished by one infidel volume. The vices practised in or supported by such dens, are necessarily local and temporary in their influence. But a single copy of an atheistical work, enduring forever and spreading its baneful influence from generation to generation, is a far greater terror to the cause of good morals than a regiment of gamblers or an army of prostitutes.

It is quite true that Dr. Rush published these books in his lifetime, and there was no possibility of questioning his right to do so in any form and in any number. Why then, it is asked, has he not the power to direct their publication after his death ? Here a totally different question arises. No one doubts that any publisher may to-day publish an edition of 100,000 copies of Paine's "Age of Reason," and advertise it in every newspaper and hand a copy of it to every man on the

street. Any capitalist may invest his whole fortune in printing the Koran and circulating it in every city and town in Pennsylvania. Levi Nice had, in his lifetime, the right to build and conduct the hall for the free discussion of religion, politics etc., mentioned in *Zeisweiss* vs. *James*, 13 P. F. Smith, 465, hereafter more fully referred to, but when by his Will he gave the remainder of his estate to an infidel society for the purpose of building such a hall, for such discussions, this Court held the gift void. The reason is obvious. A man may, within certain limits, employ as he chooses his own property during his own lifetime, but when death is about to snatch this power from him, and he appeals to the law to aid him by doing for him that which he can no longer do for himself, the law wisely refuses. It says to him, we did not interfere with you so long as you asked nothing of us, but now when you ask us to help you in carrying out your purposes by furnishing the machinery of a trust which the law only can supply, we decline. The government which we represent rests for its foundation on the principles of religion and morality. Your project aims a fatal blow at both. We shall stand back and let your project end with your own life. How could the law, if anybody is to respect it, say anything else? The authorities which we are about to cite, therefore rest on grounds which can never be shaken.

In *Updegraph* vs. *Comm.*. 11 S. & R., 394, (1824,) Abner Updegraph was *indicted* in the *Mayor's Court at Pittsburgh* for saying :—

"That the Holy Scriptures were a mere fable; that they "were a contradiction, and that although they contained a "number of good things, yet they contained a great many lies "to the great dishonor of Almighty God, to the great scandal "of the profession of the Christian religion," etc.

On the trial it appeared in evidence that the defendant was a member of a debating association; and that the expressions

contained in the indictment were uttered in the course of argument on a religious question. The defendant was convicted, and after sentence he removed the record to the Supreme Court. He escaped because the indictment omitted the word "profanely." But the *Supreme Court per Duncan, J.* stigmatised the words "as the highest offence *contra bonos mores.*" He added "even if Christianity was not part of the law of the "land it is the popular religion of the country, an insult on "which would be indictable as directly tending to disturb the "public peace. The bold ground is taken, though it has "often been exploded, and nothing but what is trite can be "said upon it—it is a barren soil, upon which no flower ever "blossomed; the assertion is once more made, that Christi-"anity never was received as part of the common law of this "Christian land; and it is added, that if it was, it was virtu-"ally repealed by the Constitution of the United States, and "of this State, as inconsistent with the liberty of the people, "the freedom of religious worship, and hostile to the genius "and spirit of our government, and, with it, the act against "blasphemy; and if the argument is worth anything, all the "laws which have Christianity for their object, all would be "carried away at one fell swoop—the act against cursing and "swearing, and breach of the Lord's day; the act forbidding "incestuous marriages, perjury by taking a false oath upon "the book, fornication and adultery, *et peccatum illud horribile* "*non nominandum inter Christianos*—for all these are founded "on Christianity—for all these are restraints upon civil liberty "according to the argument, edicts of religious and civic tyr-"any when enlightened notions of the rights of man were not "so universally diffused as at the present day. We will first "dispose of what is considered the grand objection, the *Con-*"*stitutionality of Christianity*, for in effect, that is *the question.* "Christianity, general Christianity, is, and always has been, a "part of the common law of Pennsylvania—Christianity with-

"out the spiritual artillery of European countries; for this "Christianity was one of the considerations of the royal Char- "ter, and the very basis of its great founder, William Penn; "not Christianity founded on any particular religious tenets; "not Christianity with an established church, and tithes, and "spiritual Courts; but Christianity with liberty of conscience "to all men."

"From the time of Bracton, Christianity has been received "as part of the common law of England. I will not go back "to remote periods, but state a series of prominent decisions "in which the doctrine is to be found.

"The first legislative act in the Colony was the recognition "of the Christian religion, and establishment of liberty of "conscience. Before this, in 1646, Lord Baltimore passed "a law in Maryland in favor of religious freedom, and "it is a memorable fact, that of the first legislators who estab- "lished religious freedom one was a Roman Catholic and the "other a Friend. It is called the great law of the body of "laws in the province of Pennsylvania, passed at an Assembly "at Chester, the seventh of the twelfth month, December.

"And to the end that looseness, irreligion, and atheism "may not creep in under the pretence of conscience, it pro- "vides for the observance of the Lord's day, punishes profane "cursing and swearing, and further enacts, for the better pre- "venting corrupt communication, that whoever shall speak "loosely and profanely of Almighty God, Christ Jesus, the "Holy Spirit or Scriptures of Truth, and is thereof legally "convicted, shall forfeit and pay five pounds and be impris- "oned for five days in the House of Correction. It is not an "*auto da fe*, displaying vengeance; but a law punishing with "great mildness a gross offence against public decency and "public order, tending directly to disturb the peace of the "Commonwealth. *Chief Justice Swift* in his *System of Laws*, "*2 vol., 825*, has some very just reasoning on the subject.

"He observes:—To prohibit the open, public and explicit "denial of the popular religion of a country is a necessary "measure to preserve the tranquility of a government. Of "this no person in a Christian country can complain; for "admitting him to be an infidel, he must acknowledge that no "benefit can be derived from the subversion of a religion "which enforces the purest morality. No society can tolerate "a wilful and despiteful attempt to subvert its religion no "more than it would break down its laws—a general, malic- "ious, and deliberate intent to overthrow Christianity. This "is the line of indication, where crime commences, and the "offence becomes the subject of penal visitation. The species "of offence may be classed under the following heads:—

I.—"*Denying the Being and Providence of God.*

II.—"*Contumelious* reproaches of Jesus Christ; profane and "malevolent scoffing at the Scriptures or exposing any part "of them to contempt and ridicule.

III.—"*Certain immoralities* tending to subvert all religion "and morality, which are the foundations of all governments. "Without these restraints no free government could long "exist. It is liberty run mad, to declaim against the punish- "ment of these offences, or to assert that the punishment is "hostile to the spirit and genius of our government. They are "far from being true friends to liberty who support this doc- "trine, and the promulgation of such opinions, and general re- "ceipt of them among the people, would be sure forerunners "of anarchy, and finally of despotism. Amidst the concurrent "testimony of political and philosophical writers among the "Pagans, in the most absolute state of Democratic freedom, "the sentiments of Plutarch on this subject are too remark- "able to be omitted. After reciting that the first and greatest "care of the legislators of Rome, Athens, Lacedaemon, and "Greece in general, was by instituting solemn supplications

"and forms of oaths, to inspire them with a sense of the "favor or displeasure of Heaven, that learned historian "declares that we have met with towns unfortified, illiterate, "and without the conveniences of habitations; but a people "wholly without religion no traveler hath yet seen; and a "city might as well be erected in the air, as a State be made "to unite, where no divine worship is attended. Religion he "terms the cement of civil union, and the essential support of "legislation. No free government now exists in the world, "unless where Christianity is acknowledged, and is the "religion of the country. So far from Christianity, as the "counsel contends, being part of the machinery necessary to "despotism, the reverse is the fact, Christianity is part of "the common law of this State.

"It is not proclaimed by the commanding voice of any "human superior, but expressed in the calm and mild accents "of customary law."

It will be seen from the able reasoning and conclusive logic of the case just cited, that the freedom secured by the Bill-of-Rights is a liberty of conscience, not a license to attack sacred truths. As was said in another case, this testator "might "have paid people to write against the right of suffrage, but *it "is a different thing when it assumes the shape of a charitable "devise and requires the strong aid of a Court to carry out the "design.* The Christian religion is as much a part of the "public law as any of these guarantees. The Charter says "that Penn came over to spread the Christian religion, and "the Legislature have often acted upon this principle as "where they punished the violation of the Lord's day." The books give us emphatic confirmation of the statement that Christianity has received the broadest legislative and judicial recognition. The early Act of 1705 declared void all process served on the Christian Sabbath except for treason, felony and Breach of the Peace. The Act of 1794 prohibited any worldly

employment or business whatsoever on the Lord's day. The same Act punished profane cursing or swearing "by the name of God, Christ Jesus or the Holy Ghost."

The decisions present an unbroken front.

In *Stansbury* vs. *Marks*, 2 Dall., 213, (1793,) Jonas Phillips, Esq., a Jew, was fined for refusing to be sworn on Saturday—his Sabbath.

In *Comm.* vs. *Wolf*, 3 S. & R., 48, (1817,) the defendant, although professing the Jewish religion, was fined under the Sunday Act of April 22, 1794.

In *Phillips* vs. *Gratz*, 2 Penrose and Watts, 412, (1831,) it was held that the conscientious scruple of a Jew to appear in Court on Saturday was no ground for the continuance of his cause.

In *Specht* vs. *Comm.*, 8 Barr., 312, the principle of *Comm.* vs. *Wolf* was applied to the Seventh day Baptists.

In *Omit* vs. *Comm.*, 9 Harris, 426, (1858,) the *Act of 1794* was enforced against an inn-keeper.

In these last cases the principle of *Updegraph* vs. *The Comm.* was sustained.

In *Mohney* vs. *Cook*, 2 Casey, 342, (1855,) it was directly affirmed.

LOWRIE, J., said :—

"The declaration that Christianity is part of the law of the "land is a summary description of an existing and very obvi- "ous condition of our institutions. We are a Christian people "in so far as we have entered into the spirit of Christian insti- "tutions, and become imbued with the sentiments and princi- "ples of Christianity; and we cannot be imbued with them, "and yet prevent them from entering into and influencing "more or less, all our social institutions, customs and rela- "tions, as well as all our individual modes of thinking and "acting. It is involved in our social nature, that even those

"among us who reject Christianity, cannot possibly get clear "of its influence, or reject those sentiments, customs and prin- "ciples which it has spread among the people, so that, like "the air we breathe, they have become the common stock of "the whole country, and essential elements of its life.

In *Sparhawk* vs. *Union Passenger Railway Co.*, 4 P. F. Smith, 406 and 432, (1867,) *Updegraph* vs. *Comm.* is again affirmed.

The case of the appellants might safely rest upon these citations. But fortunately for this case and for the cause of morality, the whole question may be regarded as finally settled by the decision now about to be noticed.

In *Zeisweiss* vs. *James*, 13 P. F. Smith, 465, (1870,) Levi Nice devised all his property to his grand nieces for their lives and the life of the survivor, remainder to "The Infidel "Society in Philadelphia, hereafter to be incorporated for the "purpose of building a hall for the free discussion of religion, "politics," etc.

The grand-nieces agreed to convey to defendant in fee simple; he rejected the title; the vendors brought suit upon the agreement; and the *nisi prius* gave judgment for the plaintiffs. The Opinion of the Supreme Court was delivered by SHARSWOOD, J., he said:—

"If we are to infer the nature and objects of the Corpora- "tion from the name, it means an association of infidels or "unbelievers, for the purpose of propagating infidelity, or a "denial of the doctrines and obligations of revealed religion. "It must be so understood, according to the commonly "received meaning of the term. Such an association, it would "seem, could not be incorporated under any of the general "laws of the Commonwealth. * * *

"The testator named the Infidel Society in Philadelphia, "which might have been well enough, if there was such a "society, though unincorporated, but he made it an essential

"quality of the society thus selected, that it should be incor-
"porated. That, as we have seen, was a *potentia remota*,
"which made the devise over in remainder after the life
"estates, a void devise.

"There was no trustee then competent to exercise a discre-
"tion in the administration of the charity. Building a hall
"may be an object sufficiently definite, but the trust was not
"to end there. It is evidently a permanent, perpetual one.
"The hall when built, must be kept up and maintained.
"Some person or persons must regulate the free discussion
"in religion and politics, and determine what is to be included
"under the comprehensive et cetera. It is plain that no
"Court would ever undertake to administer such a charity, or
"to exercise discretion through a trustee or trustees appoint-
"ed by them. It is not a disposition of property 'for any
"religious, charitable, literary or scientific use' within the
"Act of April 26, 1855, Section 10; Pamphlet L., 331. If this
"course of reasoning be sound, it follows that this devise is
"void as a charity, and that the reversion, subject to the life
"estate, descended to Amanda James, the niece of the testator,
"and his heir-at-law, under the Intestate Act, and that a con-
"veyance by her and the life tenants will vest a good title in
"fee simple in their grantee. In placing the decision on this
"ground, however, it must not be understood that I mean to
"concede that a devise for such a purpose as was evidently
"contemplated by this testator, even if a competent trustee had
"been named, would be sustained as a valid charitable use in
"this State.

"These endowments originated in England, at a period
"when the religious sentiment was strong, and their tendency
"was to run into superstition. In modern times the danger
"is of the opposite extreme, of licentiousness. It is necessary
"that they should be carefully guarded from either and pre-
"served in that happy mean between both, which will most
"conduce to the true interests of society.

"Established principles will enable the Courts to accom-
"plish this. Charity is love to God and love to our neigh-
"bor, the fulfillment of the two great commandments, upon
"which hang all the law and the prophets. The most inval-
"uable possessions of man are faith, hope, charity, these
"three; but the greatest of these is charity. Love worketh
"no ill to his neighbor; therefore love is the fulfilling of the
"law. It is the fountain and source whence flow all good
"works beneficial to the souls or bodies of men. It is not
"easy to see how these are to be promoted by the dissemina-
"tion of infidelity, which robs men of faith and hope, if not
"of charity also. It is unnecessary here to discuss the ques-
"tion under what limitations the principle is to be admitted
"that Christianity is part of the common law of Pennsylvania.
"By the third section of the ninth article of the Constitution
"it is indeed declared that all men have a natural and inde-
"feasible right to worship Almighty God according to the
"dictates of their own consciences; that no man can of right
"be compelled to attend, erect or support any place of wor-
"ship, or to maintain any ministry against his consent; no
"human authority can in any case whatever control or inter-
"fere with the rights of conscience; and no preference shall
"ever be given by law to any religious establishments or
"modes of worship. It is in entire consistency with this sacred
"guarantee of the rights of conscience and religious liberty
"to hold that, even if Christianity is no part of the law of the
"land, it is the popular religion of the country, an insult to
"which would be indictable, as directly tending to disturb the
"public peace. The laws and institutions of this State are
"built on the foundation of reverence for Christianity. To
"this extent, at least, it must certainly be considered as well
"settled that the religion revealed in the Bible is not to be
"openly reviled, ridiculed or blasphemed, to the annoyance
"of sincere believers, who compose the great mass of the

"good people of the Commonwealth. *Updegraph* vs. *Com-*
"*monwealth*, 11 S. & R., 394; *Vidal* vs. *Girard's Executors*, 2
"Howard (U. S.), 198. I can conceive of nothing so likely,
"so sure, indeed, to produce these consequences, as a hall
"desecrated in perpetuity for the free discussion of religion,
"politics, etc., under the direction and administration of a
"society of infidels. Indeed, I would go further, and adopt
"the sentiment and language of Mr. Justice Duncan in the
"case just referred to:—'It would prove a nursery of vice, a
"'school of preparation to qualify young men for the gallows
"'and young women for the brothel; and there is not a skeptic
"'of decent manners and good morals who would not con-
"'sider such a debating club as a common nuisance and dis-
"'grace to the city.'"

If the mere existence of a hall in which these questions were to be debated was thus regarded as without the pale of the law, what shall be said of an endowment for a printing press which is to issue arguments and assertions upon only one side of the great question. No type is ever to be set, no dollar of this Rush fund is ever to be expended, in defence of religion, but for fifty years these works are to be published without the alteration even of a comma. Could an atheist endow such a fountain of error in Turkey? Would the Mohammedan lend the protection of his laws to the destruction of his faith? Shall Christians show less zeal in the cause of truth than the infidel displays for the maintenance of error?

In *Vidal* vs. *Girard*, 2 Howard, 127, (1844,) a vigorous attack was made upon the Will of Girard simply because he had excluded all ecclesiastics as visitors to his College. He was careful to add:—

"In making this restriction I do not mean to cast any
"reflection upon any sect or person whatsoever; but as
"there is such a multitude of sects, and such a diversity of
"opinion amongst them, I desire to keep the tender minds of

"the orphans, who are to derive advantage from this bequest, "free from the excitement which clashing doctrines and sec- "tarian controversy are so apt to produce; my desire is that "all the instructors and teachers in the College shall take "pains to instil into the minds of the scholars the purest "principles of morality, so that, on their entrance into active "life, they may, from inclination and habit, evince benevo- "lence towards their fellow creatures, and a love of truth, "sobriety and industry, adopting at the same time such "religious tenets as their matured reason may enable them "to prefer."

The report does not state the fact that upon the first hearing, the Supreme Court of the United States was divided, and that a re-argument was ordered. In sustaining the Will JUDGE STORY remarked :—

"It is also said and truly that the Christian religion is a "part of the Common Law of Pennsylvania. It is unnecessary "for us, however, to consider what would be the legal effect "of a devise in Pennsylvania for the establishment of a school "or college for the propagation of Judaism or Deism, or any "other form of infidelity. Such a case is not to be presumed "to exist in a Christian country; and therefore it must be "made out by clear and indisputable proof.

"But the objection itself assumes the proposition that "Christianity is not to be taught, because ecclesiastics are not "to be instructors or officers. But this is by no means a "necessary or legitimate inference from the premises. Why "may not laymen instruct in the general principles of "Christianity as well as ecclesiastics?

"There is no restriction as to the religious opinions of the "instructors and officers. They may be, and doubtless, under "the auspices of the City government, they will always be, "men not only distinguished for learning and talent, but "for piety and elevated virtue, and holy lives and characters.

"And we cannot overlook the blessings which such men "by their conduct, as well as their instructions, may, nay "must, impart to their youthful pupils. Why may not the "Bible, and especially the New Testament, without note or "comment, be read and taught as a divine revelation in the "College; its general precepts expounded, its evidences ex- "plained, and its glorious principles of morality inculcated?

"What is there to prevent a work, not sectarian, upon the "general evidences of Christianity, from being read and "taught in the College by lay teachers?

"Certainly there is nothing in the Will that proscribes such "studies. Above all the testator positively enjoins, 'that all "'the instructors and teachers in the College shall take pains "'to instil into the minds of the scholars the purest principles "'of morality, so that on their entrance into active life they "'may, from inclination and habit, evince benevolence towards "'their fellow creatures, and a love of truth, sobriety and "'industry, adopting at the same time such religious tenets as "'their matured reason may enable them to prefer.' Now it "may well be asked, what is there in all this, which is posi- "tively enjoined, inconsistent with the spirit or truths of "Christianity? Are not these truths all taught by Christi- "anity, although it teaches much more?

"Where can the purest principles of morality be learned so "perfectly as from the New Testament?"

The whole argument on this point may thus be condensed:— Dr. Rush's endowment can only be sustained as a charity; otherwise it would be clearly void as a perpetuity. But how can it live as a charity when its avowed object is to deny the existence of God and to reject His word. No example can be found of a charity sustained where Christianity is attacked. Unless, then, the law will lend its helping hand to support a fountain of blasphemy; unless this Court is willing to write *esto perpetua* upon a monument of infidelity,—this indecent

attack upon religion and good morals must fail, and this atheistical endowment must crumble.

Will it be pretended that this trust may be so carried out as to avoid the publication of the books which Dr. Rush intended? Can infidel books be excluded and books of sound and beneficial tendency only be circulated? With his own plain direction before them requiring in absolute terms the publication of his own works "every ten years and earlier and oftener if called for," admitted by the pleadings to be atheistical and infidel, can the directors, after having received the money, resolve to violate these provisions, and to publish exclusively other books free from stuff and nonsense and irreligion? It is true that in England money bequeathed to found a Jewish Synagogue was judicially transferred to the benefit of a Foundling Hospital. *Mills* vs. *Farmer*, 1 Merivale, 55; and that a bequest for the education of poor children in the Roman Catholic faith was decreed to be disposed of by the King at his pleasure under his sign manual; *Carey* vs. *Abbott*, 7 Vesey, 490; but this in England would now be thought preposterous. In Pennsylvania the doctrine of *cy pres* has never been favored.

Theological Seminary vs. *Wall*, 8 Wright, 355.

The Act of 26th April, 1855, Purdon 207, infused a portion of its spirit into our system, but this was done with much caution, and the provisions of that Act do not touch the present case. It provides that "no disposition of property here-
"after made for any religious, charitable, literary or scientific
"use, shall fail for want of a trustee, or by reason of the objects
"being indefinite, uncertain, or ceasing or depending upon the
"discretion of a *lost* (?) trustee or being given in perpetuity or
"in excess of the annual value hereinbefore limited," and

declares that "if the objects of the trusts be not ascertainable "or have ceased to exist, or such disposition be in excess of "the annual value permitted by law or in perpetuity, "such disposition so far as exceeding the power of the Courts "to determine the same by the rules of law or equity shall be "taken to have been made subject to be further regulated and "disposed of by the Legislature of this Commonwealth, in "manner as nearly in conformity with the intent of the donor "or testator, and the rules of law against perpetuities, as prac-"ticable, or otherwise to accrue to the public treasury for the "public use." It will be seen by the merest glance at this Act that it does not in any way provide for or refer to the case of a trust for the accomplishment of a purpose detrimental to the well-being of society, and therefore opposed to the policy of the law and void. Such a trust for such a purpose stands just where it did before the passage of the Act of 1865. The representatives of the supposed charity must take it and execute it as the testator gave it, and if the law will not permit the execution of the trust, the fund must go to its natural and rightful possessors, his heirs-at-law.

VI.

If anything could possibly be clearer than the positions above maintained, the point remaining for discussion would be entitled to precedence. There is a well known statute which declares certain devises void if made within one calendar month of the testator's decease.

The bill expressly brought this case within the statute. The demurrer admitted the facts, and yet the Court below dismissed the bill. *First, the Statute.*

"*No estate*, real or personal, *shall hereafter be* bequeathed, "devised or *conveyed* to any body politic, or to any person, "*in trust for* religious or *charitable uses, except the same be* "*done by Deed* or Will, attested by two credible, and at the "time disinterested, witnesses, *at least one calendar month*

"*before the decease of the* testator or *alienor; and all disposi-*
"*tions of property contrary hereto shall be void* and go to the
"residuary legatee or devisee, next of kin or heirs, according
"to law. *Provided*:—That any disposition of property within
"said period, *bona fide* made for a fair valuable consideration,
"shall not be hereby avoided." *Act of April 26, 1855, § 11*
(*Br. Dig.; 208, § 23.*)

Now the bill, Article XII:—

"That within one calendar month prior to his decease, the
"said Dr. James Rush purchased a lot of ground, situate on
"the Southeast corner of Broad and Christian streets, in the
"City of Philadelphia, which said lot was purchased by him,
"and was subsequently conveyed for a charitable use, as set
"forth in the trusts and conditions contained in the aforesaid
"writings alleged to be his last Will and Codicils.

"Your orator avers that the contract for the purchase of
"the said lot is in the possession and under the control of
"Henry J. Williams, esq., one of the defendants, and its
"exact date cannot, therefore, be given by your orator, and
"that he needs discovery thereof."

It is no answer to this to say that under the Statute the estate is to go to the residuary legatee or devisee. Here the residuary legatee is the charity. The bill expressly avers that the lot "was subsequently conveyed for a charitable use as set "forth in the trusts and conditions contained in the aforesaid "writings." A man cannot leave the residue of his estate to a charity—outlive the month and evade the Statute by dedicating other estates for the same use within the month of his decease. If this were tolerated, the law could always be nullified by a similar contrivance. Nor is it any answer to say that the contract is not set out. The bill avers that the paper is in the possession of the co-defendant and discovery is prayed. Still less than all is it a defence to say in argument that the allegation is not true. The simple reply to that

assertion is, file an answer, and deny it in the proper manner. Of all defendants, those now before the Court should be held to the observance of this well-known effect of a demurrer. One of them, the Library Company, brought a bill in this Court at *nisi prius* against the present co-defendant. The case has been already referred to as matter of history. It is reported in *23rd Smith, 249.* The Company complained that Mr. Williams had "disqualified himself from exercising the "trust given to him by the said Will" in the matter of selecting the site for the new building. The letter from Mr. Williams to Dr. Willing, already noticed, was then strongly urged in argument. In addition to the passage quoted, in which Mr. Williams records the dedication of this lot to the Library trust, the following expressions of Mr. Williams to Dr. Biddle were relied upon:—"Now, do you (Dr. Biddle) think "it would be at all consistent with truth and honesty for me "voluntarily to violate a pledge given under circumstances "which render it as sacred as an oath, and made to a dying "man who had confided to me the management of his whole "estate? Would you, with your well-known delicacy and "sensibility to all honorable engagements, feel yourself justi- "fied in doing so, were the case your own, and should I not "lose your respect and regard (which I value very highly) "were I to hesitate for a moment as to what was my duty? "* * * * I think that considering its size, its price and "the description of library Dr. Rush intended to endow, there "is not an attainable position on Broad Street of sufficient "size to meet his views, which is preferable to the *one he has* "*himself selected.*"

In the XXXIst paragraph of their bill they charged as follows:—

"At other times the defendant alleges as an excuse that, as "the testator agreed to buy the said lot for the purpose of "having a library building erected thereon, he, the testator,

"did thus *himself* select the site for the building; and that "he, the defendant, as trustee, had not the less a right to "select voluntarily the *same* lot which the testator had thus "selected, or else that the testator's alleged selection in some "way or other took the place of that to be made by the de- "fendant, and was either binding, or could at his opinion be "made binding, and, in fact and law, has been made binding "on all claiming under the Will; the contrary whereof your "orators charge to be true, and they aver that, by his own "showing, *it was not possible* for the defendant, after the tes- "tator's death, to make a voluntary selection of that or any "other site, because he *had already in the testator's lifetime* "*bound himself by his promise not to exercise the discretion* "*which the* Will had *given him, but to build the library on that* "*site and nowhere else.*"

These citations in no wise detract from the force of the averment quoted from the bill, and impartially considered add much support to this plaintiff's case.

Be this as it may, the bill avers "a conveyance to a chari- "table use within one calendar month."

The very words of the Statute are copied in the bill. The demurrer admits the fact, and the only question would seem to be, shall the law be enforced?

No Opinion was filed in the Court below, and it is difficult to imagine reasons where none exist. In addition to that which was stated below in argument by the defendants, and which has been already answered, it was suggested that the plaintiffs were estopped. If so the matter of estoppel should be exhibited by plea or answer. Nothing on the face of the bill estops the right, and to hold that matter dehors the complaint can be set up by demurrer is an anomoly.

The following are some of the Pennsylvania cases under the *Act of 1855*.

A legacy to a religious society is void where the Will was executed but three days before the testator died.

McLean, et al., Trustees, vs. *Wade*, Exr.; Opinion of the Court by READ, J., 41 Pa. St., (5 Wright,) 266, (1862.)

In *Price* vs. *Maxwell*, (1857,) 4 Casey, 23, Opinion by LEWIS, C. J.—A devise to a school was held to be a charitable use although under the control of a religious sect, and confined to its members.

The answer set up (*p. 24,*) that Thomas Smith, the testator, made a former Will, August 3, 1841, and that even if the devise of April 10, 1856, was invalid, it was no revocation of the *Will of August 3, 1841*, and that the latter Will would stand. Messrs. *Meredith and Gerhard* (*p. 32,*) contended that if the second Will was not valid, the first stood. The *Supreme Court ruled*, (*p. 23,*):—

"Where the second devise fails, not by reason of defective ex-
"ecution of the Will, but by the incapacity of the devisee to
"take, or by any other matter dehors the Will, the first Will is
"thereby revoked.

"Independent of the general rule, the *Act of 1855* gives the
"property so devised expressly to the residuary legatee,
"devisee, next of kin, or heirs according to law, and *there*
"*being no residuary legatee or devisee in the latter Will*, it goes
"to the next of kin, or heirs according to law.

In the Will of John M. Porter, of Allegheny County, there was a bequest "to be expended in the purchase of a lot and "the erection of a College or University with library rooms, "etc., * * together with my library and $6,000 additional "to be expended in the purchase of useful books for the "library, and it is my wish that the said College be known as "the *Porter University* or *College*."

It was held that this was a charitable use, and that having "been made within a month of the testator's death it was void by *Section 11 of Act of April 26th, 1855*.

Miller, et al. vs. *Porter, et al.*, Opinion of the Court by WOODWARD, C. J., 53 Pa. St., (3 P. F. S.,) 292, (1867.)

In *Schultz's Appeal*, (1876,) 30 P. F. S. 396, SHARSWOOD, J., in delivering the Opinion of the Court (*p. 405*,) said :—

"The very able and exhaustive opinions, as well of the "auditor as of the learned Court below, have relieved us from "an examination of the English decisions upon the Mortmain "Act of that country. They undoubtedly throw a clear and "strong light upon the question presented upon this record. "*They establish two positions* :—

1.—"*That* if an absolute estate is devised but upon a secret "trust assented to by the devisee, either expressly or impliedly "by knowledge and silence before the death of the testator, a "Court of Equity will fasten a trust on him on the ground of "fraud, and consequently the statute of Mortmain will avoid "the devise if the trust is in favor of a charity."

(*P. 404.*) "Had *Reuben Yeakle* been present when the "Will was executed, or the objects of the bequest been com-"municated to him before the testator's death and he had "held his peace, there would have been some ground for "fastening a trust upon him *exmaleficio*, as in *Hoge* vs. *Hoge*, 1 "Watts 163. But nothing of that kind can be pretended here."

In *Hegarty's Appeal*, 25 P. F. Smith, 503, (1874,) a devise to religious uses made within one month of the testator's death was set aside, although the heirs-at-law had not proceeded within the time limited by the *Act of April 22, 1856*.

If this bill stand dismissed, no complaint can live which follows the very words of the Statute. If they do not furnish a suitor with a case which a Court is bound to hear, then is the law nullified, and those who are sworn to maintain it, become its executioners.

It is submitted that the decree below should be reversed.

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For Appellants.